

Exhibit 5



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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 NETLIST INC., a Delaware corporation,
16
Plaintiff,
17
vs.
18 SAMSUNG ELECTRONICS CO.,
LTD., a Korean corporation,,
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Defendant.
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CASE NO. 8:20-cv-00993-MCS-ADS

**DEFENDANT SAMSUNG
ELECTRONICS CO., LTD.'S
[PROPOSED] STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

*[Filed Concurrently with Notice of Motion and
Motion for Summary Judgment or in the
Alternative, Partial Summary Judgment;
Declaration of Joyce J. Choi; [Proposed]
Judgment]*

Date: September 20, 2021
Time: 9:00 a.m.
Crtrm.: 7C

Assigned to Hon. Mark C. Scarsi
Courtroom 7C

1 2 3 4 5 6 7 8 9 10 11	<p><u>Netlist</u>. Netlist will provide Samsung any NVDIMM-P controller on Samsung's request at a price lower than the price Netlist provides to any other buyer.”</p> <p>Section 6.2, the parallel provision, states: “<u>Supply by Samsung</u>. Samsung will supply NAND and DRAM products to Netlist on Netlist's request at a competitive price (i.e., among customers purchasing similar volumes of similar products).”</p>	
12 13 14 15	<p>21. Samsung's supply obligations would only arise if and to the extent that the NVDIMM-P product was commercialized but this never occurred.</p>	Choi Decl. ¶ 8, Exh. 7 at 31:9-12, 80:13-23, 92:4-12, 109:9-110:1, 116:3-9; ¶ 22, Exh. 21 at NL069668-69.

d. The Negotiating History Shows That Section 6.2 Is Limited To Joint Development

19 20	Defendant's Undisputed Material Facts	Supporting Evidence
21 22 23 24 25 26 27	<p>22. Netlist's first proposal to Samsung in April 2015 focused on the cash consideration, and did not mention a long term supply agreement. (“ Q Now, at least on this proposal, Netlist didn't list supply as a component of the deal; correct? A Yes, it's not here.”)</p>	Choi Decl. ¶ 18, Exh. 17 at pp. 2-4; ¶ 18, Exh. 17 at NL107807; ¶ 8, Exh. 7 at 51:3-52:18.
28	<p>23. When Netlist sent Samsung the first</p>	Choi Decl. ¶ 23, Exh. 22; ¶ 24, Exh. 23

1 8. Netlist is precluded from recovering lost profits, lost revenues from lost
2 business opportunities, or any other consequential damages by Section 12.5 of the
3 JDLA. Express waivers of consequential damages are enforceable under New York
4 law. *International Gateway Exchange, LLC v. Western Union Financial Services, Inc.*, 333 F.
5 Supp. 2d 131, 149 (S.D.N.Y. 2004).

6 9. To avoid the waiver of consequential damages, Netlist would have to
7 provide evidence of “truly culpable, harmful conduct, not merely intentional
8 nonperformance of the Agreement motivated by financial self-interest.” *Metro. Life Ins.*
9 *Co. v. Noble Lowndes Int’l, Inc.*, 84 N.Y.2d 430, 438–39 (1994). No such evidence is
10 presented here.

11 10. Netlist may not terminate the JDLA because it cannot prove a material
12 breach.

13 11. Netlist waived any right to terminate the JDLA by waiting more than four
14 years after the alleged breach to provide notice of termination. *Dun & Bradstreet Corp. v.*
15 *Harpercollins Publishers, Inc.*, 872 F. Supp. 103, 110 (S.D.N.Y. 1995).

16 12. Netlist waived the “no waiver” provision in Section of the JDLA by
17 continuing to accept the benefits of the contract for years without seeking termination.
18 *TSS–Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1027 (1988).

19
20 DATED: August 17, 2021 Bird, Marella, Boxer, Wolpert, Nessim,
21 Drooks, Lincenberg & Rhow, P.C.

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23 By: /s/ Ekwon E. Rhow
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26 Electronics Co., Ltd.
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